

**A Shaheen bte Abu Bakar v Perbadanan Kemajuan
Negeri Selangor and other appeals**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS B-02-422-95, B-02-424-95 AND B-02-425-95

**B GOPAL SRI RAM, SITI NORMA YAAKOB AND ABDUL MALEK JJCA
5 FEBRUARY 1996**

Civil Procedure — Summary possession of land — Locus standi — Whether person claiming possession must be registered proprietor of land — Whether a matter for court to determine according to facts of each case — Test to be applied — Rules of the High Court 1980 O 89

C *Civil Procedure* — Summary possession of land — Elements occupants of land need to show to exclude summary jurisdiction — Rules of the High Court 1980 O 89

D *Civil Procedure* — Summary possession of land — Burden of proof — Contest upon affidavit evidence — All evidence upon relevant issues was before court — Court's duty — Whether question on burden of proof purely academic — Whether duty of court to consider evidence and to come to conclusion — Rules of the High Court 1980 O 89

E On 12 April 1989, Perbadanan Kemajuan Negeri Selangor ('PKNS') applied to the state government for the alienation of about 4,000 acres of land in Sungei Buloh belonging to the state, for the purpose of constructing low-cost flats and houses. By letter dated 7 July 1992, the state authority approved the alienation of the land, subject to the conditions that PKNS paid the specified alienation fee, and that the consent of the state authority must be obtained in any sale of the land, except in the first sale ('the letter of approval'). A joint venture company called Punca Alam Sdn Bhd ('Punca Alam') was then incorporated in which both PKNS and a private developer had shares. PKNS then entered into a sale and purchase agreement with Punca Alam to sell the land to the latter. However, the land was not vacant. As Punca Alam and PKNS ('the respondents') were unaware of the identities of the 154 occupants on the land, they applied pursuant to O 89 of the Rules of the High Court 1980 ('the RHC') which prescribed the summary procedure to obtain possession of the land. Orders for vacant possession were then obtained on the summonses against all those in possession of the land. Although most of the occupants vacated, the three appellants remained in occupation. They had then successfully set aside the ex parte orders for possession. However, in the rehearing of the summonses before the High Court, orders of possession against each of the appellants were made. The appellants, represented by the same counsel, appealed. The appeals were heard together. Counsel for the appellants submitted that the trial judge should have dismissed the summonses, on the grounds that: (i) both the respondents were

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I not registered proprietors and therefore lacked locus standi to approach

the court for relief under O 89; (ii) O 89 had placed the burden of proving the absence of consent or licence from the state government upon the respondents, but no evidence had been led by the respondents to prove this; (iii) the respondents' affidavits filed in support of their summonses for possession did not meet the strict requirements of O 89 r 3, in that the respondents had failed to describe the nature of their interest, to set out the circumstances in which the land had been occupied, and to state that they did not know the names of the occupants of the land.

Held, dismissing the appeals:

- (1) It would be wrong for our courts to apply, without question or qualification, the views expressed by English judges or commentators, however eminent, to cases that arise before them under a parallel provision of written law without addressing the circumstances that prevail in this country, particularly in cases involving the practice and procedure of our courts (see p 835B).
- (2) Order 89 does not stipulate that only a registered proprietor may invoke its provisions. The order is silent on the issue of standing. Therefore, it is for the court to determine, according to the facts of each case, whether a particular plaintiff has standing to make an application (see p 835G).
- (3) Order 89 r 3(a) merely requires that the person claiming possession of land should state his interest in the land in question. Once this is done, it is for the court to decide whether the interest disclosed is sufficient to support the claim for possession (see p 835H).
- (4) The test of standing to be applied in cases under O 89 is one based upon a right to possession. The question that has to be asked is whether, given the peculiar circumstances of the particular case, the plaintiff has a right to possession of the land. Cases may arise where a negative response may be drawn to that question, although the plaintiff is the registered proprietor of the land, as he has parted wholly with his right to possession to some other person. In the present appeals, the trial judge came to the conclusion that although neither respondent was the registered proprietor of the land, each had standing to apply under O 89 by reason of the letter of approval (see p 836A-F).
- (5) The two elements that oust the operation of O 89 are as follows: (i) the initial entry upon the land must be lawful; and (ii) the existence of any express or implied consent or licence on the part of the owner pursuant to which the occupation continued. In respect of the second element, all that need be shown to exclude O 89 is that the issue of consent or licence is triable. The question whether the ouster elements exist in a given case depends upon its particular facts (see p 838A-C); *Bohari bin Taib & Ors v Pengarah Tanah dan Galian* [1991] 1 MLJ 343 followed.

- A (6) In a case where all the evidence upon the relevant issues is before the judge, questions as to burden become academic. Both sides having put in their evidence, it is incumbent upon the judge to consider these and to come to a conclusion one way or the other upon the issues on which a joinder had been raised. To require him to shut his eyes to the evidence before him and to decide the case purely upon the burden of proof would be a grave error in principle (see pp 838I and 839A-B); *Seturatnam v Venkatachela* AIR 1920 PC 67; *Nand v Gopal* AIR 1940 PC 93 followed.
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- C (7) This was a case which involved the summary jurisdiction of the court, in which the contest was upon affidavit evidence, and not one in which the defendant made a submission of no case to answer at the close of the plaintiff's case, arguing that the burden of proof had not been discharged. Thus, to speak of a burden of proof in a case such as the present was altogether out of place (see p 838G).
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- E (8) There was nothing in the procedural points taken by the appellants. First, contrary to the appellants' allegation, the respondents did set out the nature of their respective interest in the land in their affidavits. The complaint that the respondents had not alleged that PKNS had met the conditions set out in the letter of approval was irrelevant. Secondly, failure of the respondents to set out the circumstances in which the land had been occupied had not resulted in any prejudice to the appellants in this case, as the appellants had already told the court how each of them came onto the land, and there had been no suppression of any material fact that went to prove consent or a licence to occupy the land on the part of the respondents. Thus, this non-compliance of O 83 r 3(b) was curable under O 2 r 1(1) and (2) of the RHC. Thirdly, the point regarding the failure of the respondents to state that they did not know the occupants' name had never been raised by the appellants before the judge at the hearing of the summonses. Had that been done, the respondents might have sought an adjournment and rectified the omission (see pp 840F-I and 841A-H); *Sunkyoung International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146 followed.
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- H (9) There was no doubt that each appellant was a squatter with no occupational rights of any kind. The judge was quite correct in holding that they had neither consent nor a licence to occupy the land. He was, therefore, right in making the orders for possession against each appellant (see p 841I).

I **[Bahasa Malaysia summary]**

Pada 12 April 1989, Perbadanan Kemajuan Negeri Selangor ('PKNS') telah memohon kepada kerajaan negeri untuk pemberimilikan lebih kurang 4,000 ekar tanah di Sungei Buloh kepunyaan negeri itu,

untuk tujuan membina rumah pangsa dan rumah kos rendah. Melalui surat bertarikh 7 Julai 1992, pihak berkuasa negeri telah pun meluluskan pemberimilikan tanah itu, tertakluk kepada syarat bahawa PKNS membayar yuran pemberimilikan yang ditentukan, dan bahawa persetujuan pihak berkuasa negeri mesti diperolehi dalam sebarang jualan tanah, kecuali dalam jualan pertama ('surat kelulusan tersebut'). Suatu syarikat usahasama dikenali sebagai Punca Alam Sdn Bhd ('Punca Alam') kemudiannya ditubuhkan dalam mana kedua-dua PKNS dan suatu pemaju persendirian mempunyai syer. Selepas itu, PKNS mengikat suatu perjanjian jual-beli dengan Punca Alam untuk menjual tanah kepadanya (Punca Alam). Bagaimanapun, tanah itu tidak kosong. Oleh kerana Punca Alam dan PKNS ('penentang-penentang') tidak mengetahui identiti 154 penghuni di atas tanah itu, mereka telah memohon menurut A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang menetapkan prosedur terus untuk mendapatkan pemilikan tanah itu. Perintah untuk milikan kosong kemudiannya telah diperolehi atas saman-saman terhadap mereka dalam milikan tanah itu. Walaupun kebanyakan daripada penghuni berpindah, tiga perayu telah terus menduduki tanah itu. Mereka telah kemudiannya berjaya mengetepikan perintah pemilikan ex parte. Walau bagaimanapun, di pembicaraan semula saman-saman di hadapan Mahkamah Tinggi, perintah pemilikan terhadap setiap satu perayu telah dibuat. Perayu-perayu, yang diwakili oleh peguam yang sama, telah merayu. Rayuan-rayuan telah didengar bersama. Peguam untuk perayu-perayu berhujah bahawa hakim perbicaraan sepatutnya menolak saman-saman itu, atas alasan bahawa: (i) kedua-dua penentang bukanlah tuannya berdaftar dan dengan itu tidak mempunyai locus standi untuk memohon kepada mahkamah bagi mendapatkan relief di bawah A 89; (ii) A 89 telah meletakkan beban membuktikan ketiadaan persetujuan atau izin yang diberikan oleh kerajaan negeri ke atas penentang-penentang, tetapi tiada bukti telah ditunjukkan oleh penentang-penentang untuk membuktikan ini; dan (iii) affidavit penentang-penentang yang telah difailkan sebagai menyokong saman-saman mereka untuk pemilikan tidak memenuhi keperluan ketat A 89 k 3, oleh sebab penentang-penentang telah gagal menggambarkan sifat kepentingan mereka, menyatakan hal keadaan dalam mana tanah itu telah diduduki dan menyatakan bahawa mereka tidak tahu nama-nama penghuni tanah itu.

Diputuskan, menolak rayuan-rayuan:

- (1) Adalah salah untuk mahkamah kita memakai, tanpa soalan atau syarat, pandangan yang dinyatakan oleh hakim atau pengulas Inggeris, walau bagaimana unggul pun, kepada kes-kes yang timbul di hadapan mereka berkenaan dengan suatu peruntukan selari undang-undang bertulis tanpa menumpukan perhatian kepada keadaan yang wujud dalam negara ini, terutamanya dalam kes-kes yang membabitkan amalan dan prosedur mahkamah kita (lihat ms 835B).

- A (2) Aturan 89 tidak mensyaratkan bahawa hanya tuanpunya berdaftar sahaja yang boleh membangkitkan peruntukan itu. Aturan itu tidak menyebut apa-apa atas isu locus standi. Maka, adalah untuk mahkamah membuat keputusan, mengikut fakta setiap kes, sama ada suatu plaintif tertentu mempunyai locus standi untuk membuat permohonan (lihat ms 835G).
- B (3) Aturan 89 k 3(a) hanya menghendaki supaya seseorang yang menuntut milikan ke atas tanah menyatakan kepentingannya mengenai tanah berkenaan. Sebaik sahaja ini dilakukan, adalah untuk mahkamah memutuskan sama ada kepentingan yang didedahkan itu cukup bagi menyokong tuntutan pemilikan atau tidak (lihat ms 835H).
- C (4) Ujian locus standi yang terpakai dalam kes-kes di bawah A 89 adalah berdasarkan hak untuk pemilikan. Soalan yang harus ditanya ialah sama ada, dalam keadaan khas suatu kes yang khusus, plaintif berhak mendapatkan pemilikan tanah atau tidak.
- D Kes-kes boleh timbul di mana suatu jawapan negatif boleh diberikan kepada soalan itu, walaupun plaintif merupakan tuanpunya berdaftar tanah itu, kerana dia telah berpisah sama sekali dengan hak pemilikan kepada orang lain. Dalam rayuan-rayuan sekarang ini, hakim perbicaraan telah membuat kesimpulan bahawa walaupun tidak satupun daripada penentang-penentang adalah tuanpunya berdaftar tanah itu, setiap satu mempunyai locus standi untuk memohon di bawah A 89 akibat surat kelulusan tersebut (lihat ms 836A-F).
- E (5) Dua unsur yang menyingkirkan pemakaian A 89 adalah seperti berikut: (i) kemasukan ke dalam tanah pada permulaannya mestilah sah; dan (ii) kewujudan sebarang persetujuan atau izin secara nyata atau tersirat oleh pihak pemunya, di mana menurutnya, penghunian itu berterusan. Berkaitan dengan unsur kedua, apa yang perlu ditunjukkan untuk meniadakan A 89 ialah bahawa terdapat isu persetujuan atau izin yang boleh dibicarakan.
- F Persoalan sama ada unsur penyingkiran wujud dalam sesuatu kes yang diberi bergantung kepada fakta tertentu (lihat ms 838A-C); *Bohari bin Taib & Ors v Pengarah Tanah dan Galian* [1991] 1 MLJ 343 diikuti.
- G (6) Dalam suatu kes di mana kesemua bukti atas isu relevan adalah di hadapan hakim, persoalan berhubung dengan beban menjadi akademik. Kedua-dua pihak telahpun memberi keterangan, maka adalah kewajipan hakim untuk mempertimbangkannya dan untuk membuat kesimpulan satu cara atau yang lain atas isu di mana percantuman telah ditimbulkan. Menghendaki hakim tersebut untuk mengasingkan dirinya daripada bukti di hadapannya dan memutuskan kes semata-mata atas beban membuktikan adalah merupakan satu kesalahan prinsip yang serius (lihat ms 838I dan 839A-B); *Seturatnam v Venkatachela* AIR 1920 PC 67; *Nand v Gopal* AIR 1940 PC 93 diikuti.
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- (7) Ini merupakan suatu kes yang melibatkan bidang kuasa terus mahkamah, dalam mana pertikaian adalah atas keterangan affidavit, dan bukan kes dalam mana defendan telah membuat penghujahan tiada kes untuk dijawab pada penutup kes plaintif, dengan mengemukakan alasan bahawa beban membuktikan belum didiscaj. Dengan demikian, membangkitkan soalan beban membuktikan dalam kes seperti ini adalah tidak kena pada tempatnya pada keseluruhannya (lihat ms 838G). A B
- (8) Tiada apa-apa yang ada dalam soal prosedur yang ditimbulkan oleh perayu-perayu. Pertama, bertentangan dengan pengataan perayu-perayu, penentang-penentang memang telah menyatakan sifat kepentingan masing-masing mengenai tanah itu dalam affidavit mereka. Aduan bahawa penentang-penentang telah tidak mengatakan bahawa PKNS gagal memenuhi syarat yang dinyatakan dalam surat kelulusan tersebut adalah tidak relevan. Kedua, kegagalan penentang-penentang untuk menyatakan hal keadaan dalam mana tanah itu telah diduduki tidak memudaratkan perayu-perayu dalam kes ini, kerana perayu-perayu telahpun memberitahu mahkamah bagaimana setiap satu daripada mereka mendapat tanah itu, dan tidak terdapat penyembunyian sebarang fakta material yang boleh membuktikan persetujuan atau izin untuk menduduki tanah itu pada pihak penentang-penentang. Oleh yang demikian, ketakpatuhan terhadap A 83 k 3(b) ini boleh dibetulkan di bawah A 2 k 1(1) dan (2) KMT. Ketiga, soalan mengenai kegagalan penentang-penentang untuk menyatakan bahawa mereka tidak mengetahui nama penghuni-penghuni tidak pernah dibangkitkan oleh perayu-perayu di hadapan hakim di pembicaraan saman-saman. Jika itu telah dilakukan, penentang-penentang mungkin akan memohon untuk penangguhan dan membetulkan peninggalan itu (lihat ms 840F-I dan 841A-H); *Sunkyong International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146 diikuti. C D E F
- (9) Tiada sebarang keraguan bahawa setiap perayu adalah setingan yang tidak mempunyai apa-apa jenis hak menduduki. Hakim adalah betul dalam memutuskan bahawa mereka tidak mempunyai persetujuan dan izin untuk menduduki tanah itu. Dengan itu, beliau adalah betul dalam membuat perintah untuk pemilikan terhadap setiap perayu (lihat ms 841I).] G H

[*Editorial Note*: The appellant in Civil Appeal No B-02-422-95 has appealed to the Federal Court vide Civil Appeal No 02-3-96B.]

Notes

For cases on summary possession of land, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3521-3525. I

- A Cases referred to**
Bohari bin Taib & Ors v Pengarah Tanah dan Galian [1991] 1 MLJ 343
Cheow Chew Khoo v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457
- B** *Nand v Gopal* AIR 1940 PC 93
Seturatnam v Venkatachela AIR 1920 PC 67
Sunkyoung International Inc v Malaysian Rubber Development Corp Bhd [1992] 2 MLJ 146

- C Legislation referred to**
 National Land Code 1965
 Rules of the High Court 1980 O 2 r 1(1), (2), O 14, O 18 r 19, O 89 r 3(a), (b), (c)
 Selangor State Development Corporation Enactment 1964 s 11(a), (b)
- D** Rules of the Supreme Court O 113 [UK]
 Supreme Court Practice 1991 [UK]

Appeal from: Originating Summons Nos 24-881-94, 24-901-94 and 24-916-94 (High Court, Shah Alam)

- E** *Haji Sulaiman bin Abdullah (R Sivarasa and Wong Poh Leng with him) (WK Yap, Loo & Co)* for the appellants.
K Kirubakaran (Kiru & Yong) for the respondents.

- F** *Cur Adv Vult*
 5 February 1996

Gopal Sri Ram JCA: Perbadanan Kemajuan Negeri Selangor, or PKNS for short, is a statutory corporation created by the Selangor State Development Corporation Enactment 1964 ('the Enactment'). It has been conferred with numerous powers and responsibilities. Among other things, it is charged with the duty of improving the economic and social well-being of the State. This duty finds expression in sub-ss (a) and (d) of s 11 of the Enactment as follows:

- 11 It shall be the duty of the Corporation —
- H** (a) to promote residential, industrial and commercial development of areas in the State designated for this purpose;
- (d) to promote, stimulate, facilitate and undertake industrial, social, commercial and economic development and activities in the State of Selangor.
- I** In the discharge of these duties, it enters into various ventures for the construction of small and medium cost houses and factories. It needs land in order to accomplish this.

All land in the State of Selangor that is not privately owned is, in accordance with the provisions of the National Land Code 1965 ('the Code') vested in the state. So if PKNS needs to carry out any of its projects, it has to obtain an alienation of land from the state. All this is common knowledge. A

On 12 April 1989, PKNS applied to the state for the alienation of about 4,000 acres of land in the Mukim of Sungei Buloh, in the District of Petaling. Its purpose in applying for this land was to construct low-cost flats and houses to alleviate the constant shortage of accommodation and also to construct some factories to advance the economic growth of the state. B

On 7 July 1992, the Land Administrator for the District of Petaling wrote to PKNS informing it that the state authority had approved the alienation of the land in question, subject to a number of conditions. PKNS appealed against the imposition of some of these conditions and they were eventually removed. But there were the other conditions which still had to be met. There was the condition that PKNS had to pay the specified alienation fee, and that the land was only to be sold once to the first purchaser. Any further sale was subject to obtaining the consent of the state authority. C D

In order to carry out its object, PKNS entered into a joint venture with a private developer. A joint venture company called Punca Alam Sdn Bhd ('Punca Alam') was incorporated in which both PKNS and the developer had shares. PKNS then entered into a sale and purchase agreement with Punca Alam under the terms of which it sold the land in question to the latter. Punca Alam paid a deposit to account of the purchase price while awaiting the registration of the alienated title in favour of PKNS. E

Now, there was a problem with the land. Although it belonged to the State at all material times, it was not vacant. Vacant possession of the land was essential to enable PKNS and Punca Alam to carry out the proposed housing and industrial development. They were unaware of the identities of the 154 occupants who were on the land. They therefore prayed in aid the summary procedure prescribed by O 89 of the Rules of the High Court 1980 to obtain possession. F G

Three separate summonses were taken out. PKNS was the plaintiff in the first, while Punca Alam was plaintiff in the other two. Orders for vacant possession were obtained on the summonses against all those in possession of the land. Of the 154 occupants, 151 vacated the land in obedience to the orders. Only the appellants in these three appeals remained in occupation. Two of them applied to the court and had the ex parte orders for possession set aside. The order against the third was also set aside although he was originally represented by counsel when the summons for possession was heard. All three summonses were then reheard before James Foong J, who, after hearing arguments, made orders of possession against each of the appellants. It is against those orders that the present appeals have been brought. H I

Although there are some facts peculiar to each appeal, they all concern the same piece of land, have many other common facts and raise

A identical issues of law. The appellants are all represented by the same counsel. The respondents too have common representation. Hence, when these three appeals came up for hearing on 23 January 1996, they were, with the consent of counsel, heard together. For the reasons given, this seemed the most convenient course to take.

B So much for the background.

I must now turn to the submissions made in support of these appeals. However, since all the arguments of counsel gravitate around O 89, I think that I ought to first set out its provisions.

C Order 89, which is headed 'Summary proceedings for possession of land', is in the following terms:

1 Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

2 The originating summons shall be in Form No 8A and no acknowledgment of service shall be required.

3 The plaintiff shall file in support of the originating summons an affidavit stating —

(a) his interest in the land;

(b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and

(c) that he does not know the name of any person occupying the land who is not named in the summons.

4(1) Where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit in support shall be served on him —

(a) personally or in accordance with Order 10, rule 5; or

(b) by leaving a copy of the summons and of the affidavit or sending them to him, at the premises; or

(c) in such other manner as the Court may direct.

(2) The summons shall, in addition to being served on the named defendants, if any, in accordance with paragraph (1) be served, unless the Court otherwise directs, by —

(a) affixing a copy of the summons and a copy of the affidavit to the main door of other conspicuous part of the premises; and

(b) if practicable, inserting through the letter-box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to 'the occupiers'.

(3) Every copy of the originating summons for service under paragraph (1) or (2) shall be sealed with the seal of the Court out of which the summons was issued.

(4) Order 28, rule 3 shall not apply to proceedings under this Order.

- 5 Without prejudice to Order 15, rules 6 and 10, any person not named as a defendant who is in occupation of the land and wishes to be heard on the question, whether an order for possession should be made may apply at any stage of the proceedings to be joined as a defendant. A
- 6(1) A final order shall not be made on the originating summons except by a Judge in person and shall, except in case of urgency and by leave of the Court, not be made less than 5 clear days after the date of service. B
- (2) An order for possession in proceedings under this Order shall be in Form No 193A.
- (3) Nothing in this Order shall prevent the Court from ordering possession to be given on a specified date, in the exercise of any power which could have been exercised if possession had been claimed in an action begun by writ. C
- 7(1) Order 45, rule 3 (2) shall not apply in relation to an order for possession under this Order but no writ of possession to enforce such an order shall be issued after the expiry of three months from the date of the order without the leave of the Court. D
- 8 The Judge may, on such terms as he thinks just, set aside or vary any order made in proceedings under this order.

Tuan Haji Sulaiman of counsel for the appellants advanced three primary submissions in support of the appeals. His first submission is that this was not a case which came within O 89 because both PKNS and Punca Alam lacked standing to move the court under that order. They are not, he said, the registered proprietors of the land. Even if his clients were in illegal occupation of the land (which he did not concede), they could still call upon the respondents in these appeals — PKNS and Punca Alam — to prove that they had the right to invoke the order. E F

Second, he submitted that it was for the respondents to satisfy the court that the former were on the land without the licence or consent of the latter's predecessor in title — the State Government of Selangor. No evidence had been led to prove this. The appellants had, on the other hand, adduced evidence which pointed to quite the opposite conclusion. The judge, he argued, ought therefore to have dismissed the summonses and left the respondents to commence an ordinary action for possession by way of writ. G

The third submission of counsel for the appellants is that both principle and authority require strict compliance with the terms of O 89. If there is any omission in this respect, then the application is doomed to failure. He says that the affidavit in support of each summons did not meet the requirements of O 89 r 3. The judge should have therefore refused the relief asked for. H

Now, O 89 has its origins in the English RSC O 113 with which it is in *pari materia*. Cases decided in England and the comment upon the corresponding English rule of court are therefore of assistance when considering the scope and application of O 89. But in the final analysis, courts in this country must bear in mind the peculiar circumstances that I

- A prevail here and should therefore apply the order to meet these circumstances.

- B In my judgment, it would be quite wrong for our courts to apply, without question or qualification, the views expressed by English judges or commentators, however eminent, to cases that arise before them under a parallel provision of written law without addressing the circumstances that prevail in this country. Especially is this so in cases involving the practice and procedure of our courts, where the approach that we adopt may be at variance with that followed by courts in England.

- C Of course, if a view of the law that we take on a particular subject is similar to that expressed in an English case, it would be quite proper to cite that decision as authority for the proposition stated. But there should be no slavish adherence to English precedent.

- D I have made these observations because we were, during argument, referred by counsel to a commentary by the editors of the English Supreme Court Practice 1991 on the English RSC O 113 dealing with the scope of the order and the way in which it should be applied. The views expressed in the passages that were read by counsel are unsupported by any authority.

- E I certainly do not consider myself bound by these views and the course I propose to take is to make up my own mind about how O 89 is to be applied, having regard to any judicial pronouncements of our courts in cases where the order has come up for consideration. There may, consequently, be a difference in the approach I take and that suggested by the editors of the Supreme Court Practice; but this is inevitable because of the circumstances that prevail in our jurisdiction.

- F With that, I now turn to consider counsel's first submission. To recall, it is to the effect that the respondents are not registered proprietors and therefore lack locus standi to approach the court for relief under O 89.

- G The obvious answer to this submission is, I believe, to be found in the words of the order itself. O 89 does not stipulate that only a registered proprietor may invoke its provisions. In fact, the order is silent on the issue of standing and therefore leaves it to the court to determine, according to the facts of each case, whether a particular plaintiff has standing to make an application.

- H Rule 3(a) of O 89 merely requires that the person claiming possession of land should state his interest in the land in question. Once this is done, it is for the court to decide whether the interest disclosed is sufficient to support the claim for possession.

- I The example given by counsel for the appellants during argument sufficiently illustrates the flexibility of approach called for by O 89. He said that if a tenant left premises unattended for some time and an unauthorized person entered into possession, the former would, in reliance upon his right to enjoyment of possession, be entitled to move the court under O 89. Perhaps the landlord may also have concurrent standing to bring the action. Other illustrations could be given with no real benefit in point of principle. It depends upon the facts of each case.

In my judgment, the test of standing that is to be applied in cases under O 89 is one based upon a right to possession. The question that has to be asked is whether, given the peculiar circumstances of the particular case, the plaintiff has a right to possession of the land. An affirmative answer may be provided to that question even in cases where the plaintiff is not the registered proprietor of the land, possession of which he is claiming.

At the other extreme, cases may arise where a negative response may be drawn to that very question, although the plaintiff is the registered proprietor of the land. Such a response may be due to the fact that the registered proprietor has parted wholly with his right to possession to some other person, in which event, it would be that other person who would have standing to commence proceedings. As I earlier said, it all depends on the facts of each case.

The court must in each case undertake a careful examination of the facts and determine in whom the right of possession resides. If it is with the particular plaintiff, then, he has standing. If it lies elsewhere, then there is no locus standi.

In the present appeals, the learned judge did undertake a careful scrutiny of the evidence. He then came to the conclusion that, although neither respondent was the registered proprietor of the land, each had standing to apply under O 89 because they were beneficially entitled to it by reason of the letter of 7 July 1992. He was criticized by counsel for arriving at this finding. Perhaps the use of the expression 'beneficial' was unfortunate. It may have been better to use the phrase 'right to possession'. But, I do not perceive that the result to be affected by the turn of phrase employed by the judge.

To pursue the course suggested by counsel can only lead to a fruitless exercise in semantics. What is important is whether the evidence shows the respondents to have the right to possession. I think that it does. This is an example of a case where more than one person has the right of possession vested in him. In my judgment, the learned judge was entirely right in holding that, on the facts before him, the respondents had the necessary standing.

What I have said thus far would also answer the other point raised by counsel, namely, that the plan annexed to PKNS' affidavit shows the portion occupied by the first appellant (Shaheen bte Abu Bakar) to be within the area sold to Punca Alam. This approach overlooks the practical realities of the case.

Punca Alam is, as earlier pointed out, the joint venture vehicle by which PKNS intends to bring development to the area in question. In a case like this, it is of no practical consequence which portion of the land she occupies. The vital question is whether the occupation is lawful or unlawful. And that brings me to counsel's second submission.

Counsel has, in his second submission said that O 89 has placed the burden of proving the absence of consent or licence upon the respondents. He has gone on to suggest that, on the evidence produced by the

- A respondents, that burden has not been discharged. Before I deal with this submission, it is necessary to discuss what I regard as high authority upon the issue raised by counsel.

- B It is the decision of the Supreme Court in *Bohari bin Taib & Ors v Pengarah Tanah dan Galian* [1991] 1 MLJ 343, where the scope and application of O 89 was considered. Mohd Azmi SCJ, who delivered the judgment of the Court, explained in such simple language the approach that ought to be taken that I find it necessary to quote from his judgment in extenso:

- C In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and *some, if not all, of the other farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the 1980 alienation already approved prior to the TOLs.* The learned State Legal Adviser, Encik Hishamuddin for the respondent, pointed out that the TOLs and therefore consent were given only up to 1983. After that no TOL was issued, thus indicating absence of consent. In our view, the alleged continued consent of the state government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. *The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s 42 of the National Land Code 1965, and pending issue of titles under s 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of the state authority as exhibited by the appellants, would appear to have been made on 4 September 1980, according to the letter of the Collector of Sabak Bernam dated 25 October.*

- F In allowing the respondent's application under O 89, the learned judge had relied almost entirely on the *LESCO* case [Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Ors [1984] 2 MLJ 123] and *Sidek's* case [Sidek bin Hj Muhamad & Ors v Government of the State of Perak & Ors [1982] 1 MLJ 313]. With respect, these two decisions of the Federal Court are no authorities for the scope and application of O 89. *In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent.* Evidence viva voce is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s 42 of the National Land Code 1965.

- I Finally, it has come to our knowledge that recently in *Mohd Rawi bin Yaacob v Federal Land Development Authority*, another panel of this court (Abdul Hamid LP, Gunn Chit Tuan, and Jemuri Serjan SCJJ), had in allowing an appeal held that *where the entry to the land is lawful, and where there are triable issues, O 89 is not the proper procedure to be adopted to evict occupiers by order for possession.* (Emphasis added.)

It may be seen from the passage quoted above that there are two elements (which I shall for convenience refer to as 'the ouster elements') that oust the operation of O 89. They are as follows:

- (1) the initial entry upon the land must be lawful; and
- (2) the existence of any express or implied consent or licence on the part of the owner pursuant to which the occupation continued.

In respect of the second element, all that need be shown to exclude O 89 is that the issue of consent or licence is triable. Once triable issues in respect of element (2) are shown, the summary jurisdiction is ousted.

One other point of principle emerges from a reading of his Lordship's judgment in *Bohari's* case. It is that the question whether the ouster elements exist in a given case depends upon its particular facts.

As it happened, the facts in *Bohari's* case were unusually strong. They disclosed a legitimate expectation in the appellants, encouraged by the state government, that titles would be issued in respect of the lots occupied. The fundamental issue in that case was the absence of a licence or consent to occupy. (See, [1991] 1 MLJ at p 344, right column, last sentence.) The assurances, both explicit and implied, given by the state government to *Bohari* and his co-appellants were a sufficient indicia of consent or a licence to occupy the land pending the issue of titles to the occupants of the 515 lots. The facts of that case certainly took it out of the summary jurisdiction conferred by O 89.

In *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at pp 479-480, I called attention to the necessity of there being strict compliance with the terms of O 89 in the context of that provision being abused by a landlord against a tenant holding over after the expiry of his tenancy. However, as will transpire, what I said there has no application to the facts of this case. Put simply, these appeals do not concern tenants holding over.

Returning now to counsel's submission on the burden of proof point, it is pertinent to observe that this is not a case in which the defendant made a submission of no case to answer at the close of the plaintiff's case, arguing that the burden of proof had not been discharged. This is a case involving the summary jurisdiction of the court in which the contest was upon affidavit evidence. I cannot help thinking that to speak of a burden of proof in a case such as the present is altogether out of place.

I am very much alive to the fact that the order of possession which the judge is empowered to make in the present case is a final order. But so are the orders which are made in the exercise of other summary powers, such as those conferred by O 14 or O 18 r 19. Surely, this consideration alone, upon which counsel placed so much reliance, cannot lend any significance to the issue of the burden of proof.

In a case where all the evidence upon the relevant issues is before the judge, questions as to onus or burden become academic. See, *Seturatnam v Venkatachela* AIR 1920 PC 67; *Nand v Gopal* AIR 1940 PC 93.

A Both sides having put in their evidence, it was incumbent upon the judge to consider these and to come to a conclusion one way or the other upon the issues on which a joinder had been raised. Hence, to require him to shut his eyes to the evidence before him and to decide the case purely upon the burden of proof would be a grave error in principle. This is therefore a case where:

B The controversy had passed this stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them. (per Sir Lawrence Jenkins in *Seturatnam v Venkatachela* at p 69.)

C Consequently, all that is now necessary is to examine the facts of the present appeals to ascertain whether they exclude the operation of O 89. Since the facts relating the occupation by each appellant differ, I propose to examine them separately.

Let me take the case of Shaheen bte Abu Bakar, the first appellant.

D Her evidence is that in 1982, her father, acting upon the encouragement of the Penghulu of Mukim Sungei Pulu, entered onto the land in question. In 1983, the father built a house on the land. In the following two years, her father and the other occupiers commenced fish farming. They received assistance from the Department of Agriculture and Fisheries, who no doubt were unaware, or at the very least unconcerned, with the legality of the father's occupation of the land in question. Shaheen goes on to say that in 1995, the father 'gifted' the property to her. She says that the State constructed a Surau on the land with public funds, although I must say that the document she relies upon — a voucher from the Petaling district office — speaks, not of construction but of repairs and renovation done to an existing surau.

F These are then the circumstances upon which Shaheen relies to support her allegation that her initial entry upon the land and her continued occupation of the same. By no stretch of the imagination may a parallel be drawn between her case and that of *Bohari*. There is, in the present case, no active encouragement of the kind that was found to exist in *Bohari's* case. No promise to issue title to her or her father was ever made by the state government. Nor were there any actings on the part of the state authority which may be capable of even remotely suggesting the existence of consent or a licence. Unfortunately for her, Shaheen and her father remain what they always were: squatters on state land.

H The next case is that of the second appellant, Ho Choong Yee.

I This appellant came onto the land in 1980, when she purchased a house built on it. The vendor of the house, one Ho Yan, came onto the land in 1976. In her evidence, she goes on to say that she expended money in practically rebuilding the house and converting it into a permanent structure. In May 1987, she applied for a temporary occupation licence but was not issued with one. This is all that she has asserted in support of her case.

It is more than plain to me that the second appellant has established absolutely no basis for making the suggestion that she does: that her possession of the land is with the consent or by the licence of the state government and PKNS. Her entry upon the land was illegal as is her continued occupation of it. As a squatter, it is not open to her to resist a summary application for possession. There is no suggestion that planning permission was ever obtained for the house she rebuilt. It is an illegal structure, as are no doubt the houses of the other appellants.

I now take the case of the third appellant, Lee Yat Yee.

His case is that he went into possession of this land in 1969. He applied for a temporary occupation licence ('TOL') and was issued one, but in the name of his neighbour. In 1988, he had the TOL issued in his name. It expired in 1991 and has never been renewed since then. There is no suggestion by Mr Lee that the state authority led him to believe that his TOL would be enlarged into a greater interest in the land. Neither is there any suggestion that, apart from the grant of the TOL, there was a definite promise to issue him with a title to that portion of the land he occupies.

Based on the foregoing facts, I am unable to find any material from which the judge could have inferred either consent or a licence to occupy the land in question. Mr Lee, like the other appellants, is also a squatter with no rights whatsoever.

This brings me now to the third and last submission of counsel. It has to do with the state of the respondents' affidavits filed in support of their summonses for possession. He says that these affidavits are in hopeless disorder because they do not comply with r 3 of O 89. I will deal with each point of complaint.

First, he says that there is no description of the nature of the respondents' interest. That is not quite correct because the respondents' affidavits do set out the nature of their respective interest in the land. Counsel went on to complain that the respondents had not alleged that PKNS had paid the alienation fee and met the other conditions set out in the letter of approval. That is, with respect, quite irrelevant. Once PKNS had stated its interest, it was up to the appellants to inquire from the state authority and determine if the payments had been made. I see no difficulty in the appellants getting in that information and placing it before the court. There is therefore nothing in the first complaint.

Secondly, counsel has submitted that O 89 r 3(b) was not complied with because the respondents failed to set out the circumstances in which the land has been occupied. That is quite true. But the appellants have told us how each of them came onto the land. I cannot see how, in the circumstances of this case, the non-compliance has resulted in any prejudice to the appellants. The non-compliance is not fatal and is curable under O 2 r 1(1) and (2) of the Rules of the High Court 1980: see, *Sunkyoung International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146 at p150.

Counsel has, however, relied on the following passage in the judgment of Mohd Azmi SCJ in *Bohari*, at p 346 to support his argument that r 3(b) requires strict compliance of its terms:

- A In this case, we also find that the respondent has failed to comply with r 3 (b) of O 89 by its failure to disclose fully in its affidavit-in-support, the whole of the relevant circumstances how the lands came to be occupied by the appellants both before and after the three-year period of the TOL, and why the approval of the state executive council to the alienation of the lands to the farmers as contained in the collector's letter of 25 October 1980, was
- B neither exhibited nor implemented.

- It is of vital importance that the foregoing passage be read in the context of his Lordship's earlier observations on the conduct of the state government. That was a case where the state had applied for relief without disclosing the written assurance it had given that titles would be issued and had failed
- C to explain why this had not been done. In other words, there had been a suppression of material facts on the part of the Pengarah Tanah dan Galian in the presentation of his case. Small wonder, then, that the Supreme Court expressed its disapproval.

- The present appeals are a far cry from the situation in *Bohari*. There has
- D been no suppression of any material fact that goes to prove consent or a licence to occupy. There has been sufficient disclosure by the respondents of all the necessary facts. The complaint of counsel is accordingly, without merit.

- Thirdly, counsel submits that there has been a failure to comply with r 3(c) of O 89. The respondents have not stated that they do not know the names of the occupants of the land. That is quite true. But this point was
- E never raised before the judge at the hearing of the summonses. Had this been done, the respondents might have sought an adjournment and rectified the omission.

- Tuan Haji Sulaiman, however, says that this could not have been
- F done. According to him, every application under O 89 must be the epitome of perfection. Once there is an omission, however slight and inconsequential, the application must be dismissed out of hand and without more. If that be the case, then, it would be far better for a robot to hear applications under the order. There would be no question of any discretion being exercised or any error being overlooked.

- G But courts are manned by judges who are human and not by robots. They exist to serve the ends of justice and not to act mechanically with no application of the mental faculty. The injustice that would result in adopting the approach suggested by counsel provides the answer to the point he has taken.

- H The upshot is that there is nothing in the procedural points taken by the appellants.

- In conclusion, there is no doubt that each appellant is a squatter with no occupational rights of any kind. The judge was quite correct in holding that they had had neither consent nor a licence to occupy the land. He was
- I therefore right in making the orders for possession against each appellant.

For the reasons given, all three appeals are dismissed and the orders made by the learned judge are affirmed. The respondents will have the costs of each of these appeals and these shall be taxed under separate bills filed in each appeal. The orders of this court staying execution of the

orders of the judge are hereby vacated. The deposit paid into court shall be paid out to the respondents to account of their taxed costs.

My learned sister, Siti Norma Yaakob JCA, has seen this judgment in draft and agrees with the reasoning and the conclusions therein.

5 February 1996

Abdul Malek JCA: I have the benefit of reading the draft judgment of my learned brother Gopal Sri Ram JCA. I agree with the reasons and conclusions expressed therein.

Appeals dismissed.

Reported by Isabel Liong

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